U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

B5

PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUL 19 2006

EAC 04 159 54721

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time she filed the petition, the petitioner was a doctoral student at Albert Einstein College of Medicine (Einstein) of Yeshiva University. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The petitioner's *curriculum vitae* indicates that her research at Einstein focuses on pre-spliceosomes, which are involved in pre-mRNA splicing. The petitioner states: "the *S. pombe* in vitro system I established has provided new perspectives on the mechanism of pre-spliceosome formation, which helps to understand how the splicing machinery targets the correct intron-exon boundaries." At the time she filed the petition, the petitioner had published two journal articles with a third in preparation.

Counsel asserts that the petitioner "has made outstanding achievements in cell biology, especially in areas of biomedical research related to major health problems such as cancer and other genetic diseases." Counsel asserts that the petitioner's "breakthrough work will contribute significantly to advancing understanding [of] the molecular basis underlying the splicing mechanism, which has the promise of leading to the development of new and more effective therapies for cancer and other genetic diseases."

Several witness letters accompany the petition. We shall consider examples of these letters here. Many of these witnesses observe that a significant percentage of genetic diseases results from splicing errors, and therefore it is in the national interest to learn about the gene splicing process. This establishes the intrinsic merit of the petitioner's work. The witnesses also offer statements with regard to the petitioner's individual importance to the research effort. Dr. [redacted], an associate professor at Einstein who has supervised the petitioner's doctoral research, states:

> I have no doubt that [the petitioner] is an outstanding young scientist who has and will continue to make important contributions to biomedical research in the United States.

> In my lab, [the petitioner] has developed an entirely new in vitro system for study of spliceosome components using extracts from fission yeast. . . . The fission yeast *Schizosaccharomyces pombe* conserves many of the mammalian interactions and provides a genetically tractable system. . . .
>
> [The petitioner] discovered that, surprisingly, many of the splicing particles in fission yeast are remarkably stable (much more so than in other organisms studied), making them uniquely suited for structural biology studies.

Other Einstein faculty members offer strong praise for the petitioner's skills and accomplishments, but most of the witnesses are not on the Einstein faculty. Dr. [redacted] an associate professor at Cornell University, states: "The unique system that [the petitioner] has established drew a lot of attention from our scientific field." Dr. [redacted] an associate medical professor at City University of New York Medical School, states: "I believe [the petitioner's] work will help us significantly [in] understanding how our genome diversity is generated. . . . Her discoveries have resulted in publications of two important articles . . . that have already had a profound impact in the field." Other witnesses offer more measured responses. For instance, Professor [redacted] of the Rockefeller University repeatedly emphasizes the petitioner's "potential." Prof. [redacted] credits the petitioner with "two important new publications; Prof. [redacted] is also a co-author of one of these publications.

In terms of objective evidence of this impact (as opposed to letters created specifically in furtherance of the petition), the petitioner's initial submission includes documentation showing four independent citations of one of her articles. The petitioner also submits evidence showing that the journal that published her articles, *The EMBO Journal*, has an impact factor of 13.505, ranking 33rd on a list of 1,500 journals that publish articles related to bioscience. A high impact factor can certainly establish the prestige of a journal, but it does not establish the impact of a given article published in that journal. The citation of individual articles establishes the journal's impact factor, not *vice versa*. The impact factor of *The EMBO Journal* indicates that articles from that journal were cited, on average, 13.505 times during the two years following their publication.[1] If the petitioner's articles were cited fewer times, than her own impact factor would be substantially lower than the aggregate impact factor for the journal as a whole.

In a request for evidence issued on April 4, 2005, the director observed that the petitioner had published only two articles and that the record lacked objective evidence to establish the impact of the petitioner's past work. The director asserted that skill alone is not sufficient grounds for approval of the waiver, and that the petitioner must establish "a track record of success" that would justify the waiver.

In response, the petitioner shows that the number of citations of her published work has grown to nine citations of one article and three citations of the other. These figures remain significantly lower than *The EMBO Journal*'s overall impact factor. The petitioner also submits three additional witness letters. Two of the three witnesses are Einstein faculty members. The third is Dr. [redacted] associate professor at

[1] http://scientific.thomson.com/free/essays/journalcitationreports/impactfactor/ shows the formula for calculating a journal's impact factor.

Brandeis University and an assistant investigator at [redacted] Medical Institute. Dr. [redacted] states that the petitioner's "pioneering research . . . has significantly advanced our knowledge of the mechanism of splicing regulations" and "has drawn increasing attention in the field." Counsel states that the petitioner "plans to continue her work at [redacted] lab."

The petitioner submits printouts from the Faculty of 1000 web site (http://www.facultyof1000.com), described as "a revolutionary new online research service that comprehensively and systematically highlights and evaluates the most interesting papers published in the biological sciences, based on the recommendations of a faculty of over 1600 of the world's leading scientists." Evaluated papers are ranked with an "F1000 Factor," which determines one of three hierarchical rankings: "Recommended" ("of interest to perhaps just one section or subject area"), "Must Read" (meaning "of general interest"), and "Exceptional" ("given to a landmark paper representing the top 5% of publications each year"). One of the petitioner's articles was assigned an F1000 Factor of 4.8, with an evaluation of "Must Read" (the middle of three hierarchical evaluations) averaged from two evaluations. Another article received the lowest "Recommended" evaluation, with an F1000 factor of 3.0 from a single evaluator. The petitioner's submission does not reveal the upper range of possible F1000 factors.

Counsel states that the Faculty of 1000 evaluations and citations of the petitioner's articles show that the petitioner's work has been accepted and implemented internationally. That the petitioner's work is useful to science is not in question here; at issue is the extent of the petitioner's impact. Pointing to individual instances of demonstrated impact is of little value unless one presumes that the labor certification process should only apply to researchers whose work is entirely ignored by the scientific community.

The director denied the petition on September 13, 2005, acknowledging that the petitioner "has made original contributions that have advanced her field's research," but finding that the petitioner has not persuasively set herself apart from other qualified researchers in her specialty. The director determined that the petitioner's work has, thus far, had only limited impact.

On appeal, the petitioner submits documents showing that she completed her degree requirements on August 18, 2005, and officially received her Ph.D. on September 30, 2005. The petitioner also shows that she has been appointed to a postdoctoral position at Howard Hughes Medical Institute at Brandeis University.

The petitioner submits two new witness letters. Professor [redacted] of the University of California, Santa Cruz, offers general assertions about the importance of gene splicing research and states:

> I first heard of [the petitioner's] work in this area when it was first published in 2002, and I met [the petitioner] at the Cold Spring Harbor meeting this past August. Her presentation provided new insight into the structure and composition of the cellular machinery that carries out the splicing reactions. This work has contributed substantially to our understanding of this central process and I was thrilled to hear that [the petitioner] was continuing her important work in the lab of Dr. Niko Grigorieff at Brandeis, using cryo-electron microscopy. This method is extremely new, challenging and very promising. There are less than a handful

> of places in the entire world where this method can be carried out. [The petitioner's] efforts are sure to be fruitful and revealing.

Prof. Ares, like some previous witnesses, discusses the petitioner's mastery of new technology and methods. *Matter of New York State Dept. of Transportation* addresses this issue. Simple exposure to advanced technology constitutes, essentially, occupational training which can be articulated on an application for a labor certification. Special or unusual knowledge or training, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

Dr. [redacted], an associate professor at the University of Colorado at Boulder, states:

> I have interacted with [the petitioner] in annual scientific meetings and have closely followed her scientific work, which is of the highest quality. . . .
>
> I strongly believe that [the petitioner's] achievements on pre-mRNA splicing with its potential impact on the battle against human hereditary diseases and cancer warrant a reconsideration of such decision. We are in dire need of more qualified researchers to help us to understand more about aspects of these diseases to reduce the very high mortality rate. . . .
>
> I am fully aware of her excellent work published in *The EMBO Journal*, a prestigious European journal with international circulations, [which] drew my attention immediately. [The petitioner] has established a novel biochemical system in the fission yeast *S. pombe*, a system that people have been trying to establish for decades without much success until the findings of [the petitioner's] work. This is a strong proof that [the petitioner's] research capability far surpasses those of other researchers with similar background and skills.

Counsel asserts, correctly, that citations are only one possible gauge of a researcher's impact, and that witness letters can also serve as valuable evidence in that regard. That being said, establishing eligibility must be more than a matter of locating favorable witnesses and obtaining letters from them. Counsel protests that the regulations and case law do not specify any particular type of evidence that is required to establish eligibility, but it is equally true that neither the regulations nor case law mandate the approval of a petition simply because the record contains independent witness letters. In this instance, the new letters, like those before them, attest to the quality of the petitioner's work with little concrete information about the impact that that work has had. Claims about the petitioner's postdoctoral work at Howard Hughes Medical Institute carry negligible weight because the petitioner did not work there until after the petition had been denied, let alone filed. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Some witnesses, in evaluating the petitioner's skills, virtually quote the regulatory definition of "exceptional ability" from 8 C.F.R. § 204.5(k)(2). Statutorily, exceptional ability is not a presumptive ground of eligibility for the waiver.

The petitioner has clearly impressed her professors and mentors, and appears to have a productive and potentially distinguished career ahead of her. Nevertheless, the waiver application appears, at best, to be premature. When she filed her petition, the petitioner was a graduate student who had published two moderately-cited articles. The petitioner's entire documented track record, as of the filing date, consists of a few years of graduate study. The petitioner bears the burden of showing that this period of study has not merely imparted valuable skills and yielded useful findings, but has also led to demonstrable impact beyond what could be typically expected of not only an average researcher, but a researcher of exceptional ability in the sciences. Barring persuasive evidence that her early work prominently stands out in the field, we cannot find that the few data points afforded by her graduate study suffice to warrant a finding of eligibility.

We note that, despite the concerns of some witnesses that the denial of this petition would inevitably result in the petitioner's immediate expulsion from the United States, the petitioner qualifies to continue her work in nonimmigrant status, during which time her employer can pursue labor certification or the petitioner can add new achievements to lend support to a potential future attempt to qualify for the waiver. Given that postdoctoral work is, generally, inherently temporary, we are not easily persuaded by the claim that permanent immigration benefits are required for an alien to pursue such short-term work.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.